Exhibit “A”

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ALLSTATE INSURANCE COMPANY, ET AL.,	11-CV-2391(JG)
Plaintiffs,	
-against-	United States Courthouse Brooklyn, New York
KHAIMOV, ET AL.,	Thursday, February 16, 2012 10:30 a.m.
Defendants.	

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE JOHN GLEESON
UNITED STATES DISTRICT JUDGE

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A P P E A R A N C E S: (Continued.)

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(In open court.)

COURTROOM DEPUTY: All rise. The United States District Court for the Eastern District of New York is now in session. The Honorable John Gleeson is now presiding.

(Honorable John Gleeson takes the bench.)

COURTROOM DEPUTY: Calling civil cause for oral argument in Docket No. 11-CV-2391, *Allstate Insurance Company, et al. against Khaimov, et al.*.

Counsel, please note your appearances for the record.

THE COURT: Hello.

MR. VALERIO: Good morning.

MS. BURGOS: Good morning.

THE COURT: State your appearances, please.

MS. BURGOS: Your Honor for the plaintiffs, Sandra Burgos along with Robert Stern and William Natbony.

MR. VALERIO: For the moving defendants, Amner Khaimov, Zoya Aminova, Murdakhay Khaimov, Albert Khaimov, Ilya Tamayeff, for Laperla Supply, Parsons Medical Supply, Jamaica Medical Supply Queens Medical Supply, Grand Medical Supply, Utopia Equipment and New Capital Supply, Max Valerio, Tsirelman & Valerio, P.C., and I will be joined this morning by Mr. Tsirelman.

MR. TSIRELMAN: Good morning, your Honor, same defendants.

THE COURT: Okay. Good morning.

MS. DIGLIO: Maria Diglio for defendants Yakov Aminov, GNK Medical Supply and High Lawn Medical Supply and I am joined by Edward Blodnick a partner in my firm.

THE COURT: Good morning. Is Royal Medical Supply among the moving parties?

MR. NATBONY: I think so.

THE COURT: They're not listed, but I was wondering why not.

MR. NATBONY: They're not listed, your Honor.

THE COURT: But that's your client?

MR. TSIRELMAN: Yes, your Honor.

THE COURT: You're moving on its behalf as well?

MR. TSIRELMAN: Yes.

THE COURT: Any objection to allowing them to join this motion?

MR. STERN: No, your Honor.

THE COURT: Okay. Who wants to be heard first.

MR. BLODNICK: Your Honor, we thought we would be heard on the arbitration issue first because a different lawyer is arguing that, and then we would be heard on the rest of it.

THE COURT: Okay.

MR. BLODNICK: Your Honor, my argument is going to be very brief. The Supreme Court ruled in *AccuCredit* that

an arbitration clause is enforceable unless the statute specifically says there can be no arbitration. The language contained in every no-fault policy is either this language or similar language. In the event any person making a claim for first-party benefits --

THE COURT: Slow down a little bit because he's still taking it down.

MR. BLODNICK: Okay.

THE COURT: Sorry to interrupt.

Go ahead.

MR. BLODNICK: And the company do not agree regarding any matter relating to the claim, and I emphasize any matter relating to the claim, such person shall have the option of submitting such disagreement to arbitration pursuant to procedures promulgated or approved by the Superintendent of Insurance. In *CompuCredit*, the Court made the following rulings.

Starting with the background law covering the issue before us is the Federal Arbitration Act enacted in 1925 as a response to judicial hostility to arbitration. This provision establishes a liberal federal policy favoring arbitration agreements. It requires courts to enforce agreements to arbitrate according to their terms. And then it refers to the specific language in the case before them which contains the following language.

"You have a right to sue a credit repair organization that violates the Credit Repair Organization Act. Any waiver by any consumer of any protection provided by, or any right of the consumer under this subchapter shall be treated as void and may not be enforced by any federal or state court or any other person."

The Court went on to say:

"The only consumer right it creates is the right to receive the statement which is meant to describe the consumer protection that the law elsewhere provides."

Interpreting the right to sue language in §1679 (c)(a), to create a right to sue in court not only renders it strikingly out of place in the section that is otherwise devoted to giving the consumer notice of the rights created elsewhere, it also renders the creation of the right to sue elsewhere superfluous.

The Court then goes on to say in *McMahon*, "We enforced an arbitration agreement with respect to a cause of action created by a provision of the Racketeer Influenced Corrupt Organizations Act," which read in part.

"Any person injured in his business or property by reason of a violation of Section 1962 of this chapter may sue, therefore, in any

appropriate United States District Court to shall recover three-fold damages he sustained to the cost of the suit."

Thus, we have repeatedly recognized the contractually required arbitration claims satisfies the statutory prescription of civil liability in court.

And then the Court goes on to describe the language as necessary to provide that there can't be arbitration. It has done so with the clarity that far exceeds the claimed indications in CLRA.

"No predispute arbitration agreement shall be valid or enforceable if the agreement requires arbitration of a dispute arising under this section."

There is no such language in our case.

"Only if after such controversy arises, all parties to such controversy consent in writing to the use of arbitration to settle such controversy."

There is no such language in this case.

If your Honor finds that the claims here relate in anyway to the first-party benefits we as assignees of the first-party benefits have a right to arbitration.

Thank you, your Honor.

THE COURT: Thank you.

I want to hear all the defense arguments on all of the -- with respect to all aspects of the motion and then I'll hear from the plaintiff.

MR. BLODNICK: Your Honor, may I sit down?

THE COURT: Of course you may.

MR. BLODNICK: Thank you.

THE COURT: Thank you, sir.

MR. VALERIO: Just to clarify on the arbitration issue, your Honor.

Plaintiffs argue that Section 409 of the Insurance Law directs them to initiate civil suits. Now, Section 409 sets forth a framework whereby insurance companies must have a plan to submit to the Superintendent, and this plan must detail how they intend to combat fraud, insurance fraud.

As part of this claim, Section C describes some of the activities that they can carry out. One of these activities is initiation of civil actions. What we are saying doesn't contradict or impair insurers' rights in anyway. They have the right to initiate civil actions.

Incidentally, they also have an obligation to inform law enforcement agencies. The reason is when there are criminal violations it's not the insurance company's duties to prosecute them it's obviously law enforcement agencies, and they also have an obligation under the

Insurance Law to notify administrative agencies of any pattern of overcharging or overbilling or fraudulent billing, which they haven't pled in their complaint which happened in this case. But regardless, they have the right to do it. They can commence whatever civil proceeding they want, but that provision, which was enacted long after the mandatory endorsement was promulgated. That provision doesn't say: And by the way if you, insurer, commence a civil action you have thereby eliminated the claimant's right to arbitration.

So the two are perfectly reconcilable. If they commence actions they can pick whatever venue they want, but this doesn't eliminate claimant's rights to arbitration and that right is what we're trying to enforce here today.

I'm done with the arbitration portion.

THE COURT: Okay.

MR. VALERIO: If you -- whatever the Court wishes, we can take the other arguments.

THE COURT: Whatever other arguments you wish to make in support of the motions.

MS. DIGLIO: My arguments have to do with the RICO motion.

THE COURT: Understood.

MS. DIGLIO: So on the part of our clients we've

moved to dismiss the civil RICO cause of action against Yakov Aminov. There is no RICO action against the two companies, GNK and High Lawn.

Really, the crux of my motion is that Allstate has failed to plead a distinct enterprise and let me go through it a little bit.

Section 1961(4) defines an surprise to include an individual, partnership, corporation, association, or other legal entity, et cetera, et cetera, group of individuals associated in fact although not a legal entity.

The Supreme Court in *Turkette* elaborates a little bit. Explains that the enterprise must exist separate and apart from the pattern of activity in which it engages. It also says it must be an ongoing -- an organization distinct from the conduct of the culpable defendants.

And finally, it says, "The enterprise is not the pattern of racketeering activity; that it's an entity separate and apart from the pattern of activity which it engages." That's *Turkette*, that's still good law.

So what's the enterprise here?

THE COURT: You don't want me to overrule the Supreme Court?

MS. DIGLIO: I don't want them to say it's not

good law any more. As far as our research, it's still good law.

THE COURT: Doesn't it only have relevance to association-in-fact enterprises?

MS. DIGLIO: I don't believe so. It just talks about the enterprise. I mean, the language of *Turkette* says, "The enterprise."

THE COURT: But in that case it was an association-in-fact that was a bunch of drug-dealing obstructing-of-justice criminals; right?

MS. DIGLIO: Yes. But the language --

THE COURT: The problem was whether they -- the enterprise element and the pattern element will coalesce because there was no structure. It was just a bunch of bad guys committing crimes, and the Supreme Court said, "No, no, you have to prove structure separate and apart from the pattern." The proof may coalesce, but there are separate elements. But here we don't have an association-in-fact enterprise.

MS. DIGLIO: Completely understood, your Honor.

What we have here is the enterprise that is alleged is GNK and High Lawn, but I mean GNK and High Lawn.

THE COURT: It's okay, I'll understand.

MS. DIGLIO: And that defendant Aminov, together with unknown persons, exerted control over GNK to organize

the racketeering activities. The racketeering activity is the mail fraud.

THE COURT: Right.

MS. DIGLIO: So the problem is that in Paragraphs 34 and 125 of the complaint the plaintiffs allege that GNK and High Lawn were formed for the singular purpose of fraudulently billing carriers. For the singular purpose.

So case law in this circuit, in this district, *Atkins V. Apollo*, holds that:

> *"In a fraud-based RICO claim, if the sole purpose of the alleged enterprise is to perpetrate the alleged fraud there can be no enterprise for RICO purposes."*

So I think, your Honor, what we have here is a garden variety fraud claim couched in RICO language. This company exists solely to provide medical supplies to persons injured in car accidents and to bill Allstate and the insurance carriers for those enterprise. You take away the racketeering activity, which is the mail fraud, which is the mailing of the bills, this entity doesn't exist. It only exists to do that billing. Why else would it be in business? It can't be in business without the alleged racketeering activity.

Now, plaintiffs try to correct this in the opposition to the motion, state that plaintiffs and GNK

would exist if the racketeering activity were removed from the equation. But as I said, how can that be? It can't be. It can't be that they would exist if you remove the racketeering activity. So it's not distinct. The enterprise is not distinct from the racketeering activity, that's our argument.

THE COURT: Wasn't the same thing true in *Turkette*? They weren't, like, they didn't have legitimate side jobs. All they were doing was dealing drugs and obstructing justice, burning things down and the like. They wouldn't have existed, but for their racketeering activity.

MS. DIGLIO: Understood. And there's other case law that says that courts should be on the lookout for cases that are -- fraud cases that are -- and I'll quote from *Maersk* that are really nothing more than an ordinary fraud case.

THE COURT: I understand. That argument got lost about 25 years ago. Lost in *Sedima*, got lost in H.J. People have been griping about this civil RICO cause of action for a long time and the courts have been saying, "Take it to the Congress, we didn't write this thing." I read your brief. You're doing it again. It's like this is a garden variety fraud case but may be so --

MS. DIGLIO: Except in the other complaints that I've read it's never been alleged that the sole purpose for

the corporation, or for the P.C., the corporation in this case, but P.C.s are medical professional corporations and other claims. The sole purpose for their existence was to perpetrate this fraud which is specifically alleged by the plaintiffs.

THE COURT: You think your problems are too undilutedly evil to be RICO defendants. They have to have some legitimate connection?

MS. DIGLIO: My argument is they may be fraud defendants but not RICO defendants.

THE COURT: And that's because there are two undilutedly criminal to qualify.

MS. DIGLIO: Allegedly. Well, if they're all --

THE COURT: Let me finish, he's taking it down.

MS. DIGLIO: Okay.

THE COURT: Let me finish.

MS. DIGLIO: Okay. Sorry.

THE COURT: Because they don't do some decent law-abiding stuff on the side they don't get to be RICO defendants. That's a weird rule.

MS. DIGLIO: It's not my contention that they have to do some other law-abiding stuff on the side, but when the plaintiffs say they've only been created to perpetrate this fraud then that --

THE COURT: I thought that was the precise

argument that the First Circuit bought in *Turkette* and the Supreme Court blew out of the water.

Is it?

MS. DIGLIO: I don't believe so.

THE COURT: I'll have to reread the case because I thought what the First Circuit said was that you can't have a purely illegitimate enterprise because of the waif 1961(4) was drafted at the association-in-fact because he used the *Generis* principle, however that gets pronounced, applies to that definition of enterprise and the Supreme Court said, "No, that's wrong."

The Government won in *Turkette*. People arguing against the argument you're making here won, and that's the Supreme Court of the United States. So what exactly would you have me done with that scenario?

MS. DIGLIO: *Turkette* was a criminal case and the language in *Turkette*, I believe the language in *Turkette* applies in this case in our favor.

THE COURT: All right. Great. Thank you.

What else?

Any other arguments you want to make in connection with RICO claim or anything else for that matter? I read your briefs.

MS. DIGLIO: You have my brief.

THE COURT: You're welcome to enhance or emphasize

anything.

MR. VALERIO: Just to clarify on two elements in the brief.

Reliance. We show to the Court through the briefs that in the No-fault System, insurers have the unqualified right to question the veracity, the accuracy, and any other aspect of any bill that they have received.

Look at the allegations here. What they're saying is: We received a bunch of bills, we looked at them, we decided to pay them, and then we woke up four years later and realized that there was something wrong with them. This is contrary to both general principles governing fraud and no-fault principles.

The courts have consistently ruled if you, sophisticated party, have an opportunity, or are granted by the applicable statutes, an opportunity to do your due diligence and you don't you can't come back years later and claim that you were defrauded. The due diligence should have been done. This is general fraud.

In no-fault, specifically, the rule is clear -- if an insurer requests verification of a claim, and that is a technical term, which means issues a letter saying I want to know A, B, C, D through Z or whatever other information they want. If the provider doesn't respond satisfactorily, and, by the way, the insurer is the only

judge of whether or not the answer is satisfactory at the claim stage the insurer doesn't even need to pay or deny.

Now, the brief by Allstate completely neglects to discuss this portion. They just say: We have only 30 days, we got to do something in haste. It's not so. They have all the time on earth. Appellate case law demonstrates that if a provider sues while a verification request is still outstanding, the claim will be dismissed as not ripe. Why? Because the insurer has the right to receive the information that they request.

How does this play out in our argument? Very simply, whatever reliance they are alleging is not justified. We annexed to our motion a bill. Now, they say this bill doesn't inform Allstate of the type of equipment, or the nature of the equipment, how much it costs, et cetera, et cetera. It's right there, they have it in their face, and they can hold on to it for 30 days. Now, if they don't do it, if they don't challenge it within 30 days, that's it.

The Court of Appeals has said conclusively: You can question a fraudulent bill but you must do it within the No-fault System, within the time lines, the deadlines, within the procedures set forth in No-fault. You don't do it, game's over.

THE COURT: Reasonableness in just about every

context, though, and I hear your argument, but reasonableness in just about every context whether it's negligence with this due diligence obligation is kind of a quintessentially a fact determination and I'm not persuaded that this is something that I can resolve on a §12(b)(6) motion.

MR. VALERIO: I will be happy to address that concern.

THE COURT: How can I determine as a matter of law with respect to all of these claims that there was no reasonable reliance. It me that's going to be so intensely fact bound.

MR. VALERIO: At least so much of the complaint as alleges that there was inherently wrong on the bills; that the bills are facially defective or misleading or false. At least so much of the complaint that alleges that much should be dismissed as a matter of law. There is no justifiable reliance.

I respectfully disagree with the fact that you cannot address it as a matter of law, but even if you want to leave to as a factual determination for later determination at least the portion of the complaint that says, or that questions the facial validity of the bills, must be resolved as a matter of law. They cannot inject an issue of fact into something that they had in their face.

THE COURT: Okay. I understand.

MS. DIGLIO: If I might just add a little corollary to that?

For example, there is items that were billed in accordance to fee schedule and some that were billed in accordance with their non-fee scheduled items, and the complaint makes that pretty clear. At least with respect to the fee scheduled items, there are several allegations in the complaint that these items were miscoded and that they were coded incorrectly and that some of the bills had codes on them that didn't exist in the workers' compensation fee schedule.

I submit that that's what my colleague is arguing -- that those are facial -- these are facially -- that there's no misrepresentation. The bill is the bill, it says on it exactly what it says. So there is no misrepresentation, this is it. And as sophisticated insurer will be able to say: Well, oh, that's not the right code for that, or that doesn't exist. In that case, it's argued in my brief as well that there is no reliance on that as well.

MR. TSIRELMAN: If I may, your Honor, if I can just add.

I would like to also point out to the Court that in this case perhaps different from any other cases in

that the insurer receives thousands of bills not only from this supply company but from hundreds of supply companies. So being on the receiving end of thousands of bills it can certainly look at the bills that it receives from everyone else and compare this client's bill to someone else's when they receive a bill for the same item, and in that way that reliance is simply unreasonable.

They cannot receive bills from thousands of clients, thousands of supply companies, who, for example, billed a hundred dollars for a supply then receive a bill from this supply company that billed them a thousand dollars for the same supply and say: We're just going to pay it. We're going to close our eyes. We'll pay it and we'll sue them later.

This leads, your Honor, so some very strange results. An insurance company that is diligent in reviewing each and every bill at the time it receives them within the 30 days as the No-fault Law allows gets nothing from my client. An insurer that is negligent pays the claim, has the right to now get that money back in triplicate. The negligent behavior in this case rewards the insurance companies and that cannot be the case.

THE COURT: Thank you. Anything further from the moving defendants.

MS. DIGLIO: No, your Honor.

MR. VALERIO: No, your Honor, but with the Court's permission I would like to reserve five minutes for reply.

THE COURT: We don't do time. But it's your motion so you'll get a reply.

MR. VALERIO: Thank you.

MR. NATBONY: Good morning, your Honor.

THE COURT: Maybe I should do time. Get one of those lights.

MR. NATBONY: Good morning, your Honor.

If I may, I'd like to address the arbitration issue first.

THE COURT: Yes.

MR. NATBONY: As to that issue, actually, same counsel were before your Honor back in October on this very issue in the *Allstate versus Lyons* case. And, in fact, the oral argument for that case for another reason was actually attached to our papers. So to the extent that I won't repeat that argument since it's already in these papers and I trust your Honor will be able to read that. But what I'd like to do is focus on a couple of arguments that were made in the reply papers that we didn't have an opportunity to respond to and address, the *CompuCredit* decision which came down after our initial papers.

Our initial papers, obviously, included the argument that affirmative recovery actions are addressed by

Mallela; that they're outside the normal No-fault claims process; that, there no more claims left, they've been paid; there are no claimants, and that this issue has decided by *Progressive* by Judge Gammerman.

But as far as Insurance Law §409 I think it's important to talk about that and the *CompuCredit* decision. What I heard from my colleagues is that they admit that Section 409 provides the right of insurers to file actions to, in fact, enforce and initiate actions when there is insurance fraud that has to be dealt with. Significantly, Section 409 gives the insurers the right not only to prosecute such actions but to initiate such actions. Those are the words in the statute. So, in fact, §409 puts the decision about where and how to commence civil actions into the insurers because of the use of the word initiate.

Now, relying on *CompuCredit*, what I'm hearing is the argument is that because insurers would have the right to initiate an arbitration that would be a civil action and, therefore, they would have the right that is recognized by Insurance Law 409. Well, the problem is that's just dead wrong because insurers do not have the right to commence an arbitration, and this is the key difference between here and *CompuCredit*.

In *CompuCredit*, you had a situation where there was a law that said: A consumer can sue a credit

repair agency. Okay, well that's fine. And then the issue became, well, does suing mean an arbitration or a lawsuit? The arbitration clause in that case said that both sides had the ability to commence an arbitration. It says, "Upon the election by you or us, issues will be resolved by binding arbitration." So no dispute there that the consumer had a right to commence an arbitration. Here Section 409 of the Insurance Law says that insurers have the right to initiate civil actions to deal with fraud.

In the case of *Country-Wide versus Harnett*, 426 F. Supp. 1030 decided by Judges Lumbard, Griesa, and Goettel make it absolutely clear that under the arbitration provisions of No-fault insurers cannot initiate arbitrations, and that's because of the language of the arbitration provision. It says, "An applicant for benefits may initiate arbitration proceedings," that's not an insurer. They're the applicant for benefits.

And even if you look to the actual No-fault contract which they have cited to that says that you have to look at the arbitration provisions as set forth in the regulations promulgated by the Superintendent, and those are that only an application for first-party benefits has the right to commence an arbitration.

So here's the problem. Under their theory, they're saying arbitration right replaces Insurance Law

§409. The problem is insurers do not have the right to commence an arbitration proceeding. So what happens? Well, there has to be a way to reconcile Insurance Law §409 to recognize those insurers' rights, which they've admitted we have, you heard him saying, "We can do whatever we want under §409," and the arbitration provision. And the way to do it is exactly what Judge Gammerman did in the *Progressive* case -- to recognize there is a difference between an arbitration proceeding that they can institute when there is a claim or a No-fault claim pending to deal with these issues and something different, which is an affirmative recovery action once that claim process has finished which insurers have under §409 under things like RICO, common law fraud, unjust enrichment which is what is here.

So in that respect *CompuCredit* does not help them. It, in fact, reemphasizes why *Mallela* and other cases and *Progressive* have all recognized this independent affirmative right of recovery for insurers.

With respect to the other arguments, I would defer, at least on the arbitration, to the arguments set forth in our previous argument on the *Lyons* case.

Now, the other issue I would like to touch briefly on even though my colleagues didn't mention it was the argument with respect to joinder which they've made.

Under Rule 20(a)(2), the real question here

is: Do the claims that we have asserted arise out of the same transaction or occurrence or series of traffics or occurrences, and are the claims logically connected? Are they logically connected in a way that would make sense for them to be in the same proceeding?

Unlike what the defendants have argued in their motion, there is no illustrated disconnected nature of these claims. To the contrary, the complaint shows remarkably consistent fraudulent conduct by the defendants which can only be explained by concerted or joint conduct rather than coincidence. Nowhere do the defendants point out any significant differences between the allegations knowledge the various defendants and there's a good reason because they can't.

I mean, let's take a look at the cases that they cite. *Lyons*, for instance, *Lyons* was a case where we were talking about copyright infringement. And in *Lyons*, what happened is people just used the same portal or website to steal music. That was the only thing that was the same. Okay. Well, people can make independent decisions to go use that website to steal music. There is no real logical connection there -- I'm sorry, that was Arista Records. *Lyons* was a case in costumes where they found a few different costume shops that were knocking off characters. Was there any allegation that the costumes were the same;

that the characters were the same, no. Again, this could be an instance of shops merely deciding that they could make money by knocking off costumes. Where was the logical connection? The court said there was none.

How about the *Nassau County* case? In the *Nassau County* case, there was something like -- the number may be off -- but 164 different insurers, and the allegations that they were terminating agents improperly. Well, the problem was the reasons were all different and the timings were all different. So there was no logical plan, no logical way to connect all of these.

Here, the similarities in actual conduct, methods, fraudulent statements, patterns, and tools cannot be explained by independent conduct. There is no other rational explanation other than joint communication, plan, or action. When you are submitting bills and you have to come up with a phantom code number to put into the bill how is it that that phantom code number was the same for all these defendants? How is it that the same improper billing codes are being used by all the defendants? How is it that it's all the same equipment?

THE COURT: I understand the argument.

MR. NATBONY: So with that respect, and I would also argue simply as a matter he judicial economy, it doesn't really make sense when you've got all this logical

connection to have seven different lawsuits out there with seven different or six or seven different lawsuits which is in essence what they're saying because they're saying it should be severed, dismissed and severed. I mean, they should be dealt with in one forum now and here. Thank you, your Honor.

THE COURT: Thank you.

MS. BURGOS: Your Honor, with the Court's permission, I will address the issues raised with respect to the RICO and fraud pleadings.

First, I think it should be noted that if we were to set aside the facts that the defendants that are represented by Ms. Diglio and Mr. Blodnick have moved to dismiss claims that weren't even pled such as an association-in-fact enterprise that the plaintiffs didn't plead, or a conspiracy claim that the plaintiffs did not plead, or an aiding and abetting claim as against her clients, GNK and High Lawn, which the plaintiffs did not plead as against them I think we get down to what arguments they do make. And I think the arguments that they do make can be rejected out of hand because they're not supported by the allegations in this case, or by relevant case law.

First, to the extent that they claim that the RICO pleadings fail because the plaintiffs failed to allege a distinction between the enterprise and the pattern of

racketeering activity, they're wrong.

Number one, the plaintiffs did not plead an association-in-fact enterprise, they have pled a legal corporate entity enterprise.

Number two, in 2009 the Supreme Court handed down the *Boyle versus United States* decision that said that there is no distinction that is required between the enterprise and the pattern of racketeering activity. But even if that weren't the state of the laugh, which it is, the plaintiffs have sufficiently alleged that the enterprises exist separate and apart from the racketeering acts. Racketeering acts being the submission of hundreds, if not thousands, of fraudulent claims that materially misrepresent that they provided DME and/or orthotic devices that weren't provided that were provided, if at all, pursuant to a fraudulent medical protocol that were provided with codes that do not exist, or with codes that were substantially upcoded.

In addition to that, what I think is important to note is that the plaintiffs have included allegations that the enterprises paid kickbacks to no-fault clinics in exchange for prescriptions. Paid kickbacks to wholesalers in exchange for inflated wholesale invoices. They exerted efforts to obtain prescriptions from no-fault clinics pursuant to a fraudulent medical protocol and not

based on medical need, and exerted efforts to ensure that the no-fault clinics that were providing them with the prescriptions took the necessary steps to obtain the claimants' signatures on documents that they knew would be required in order to make their submissions to the insurers.

So at bottom, even if we were to separate the enterprise from the racketeering acts, I respectfully submit that the enterprises would still exist so that argument fails.

THE COURT: All of your alleged the enterprises for RICO counts are P.C.s; correct?

MS. BURGOS: They're corporation, yes, your Honor, corporate entities.

THE COURT: Professional corporations?

MS. BURGOS: Not professional corporations in this particular case, they're business entities. They're Inc.s to the extent.

THE COURT: None of them is also a RICO defendant?

MS. BURGOS: None of the corporate entities is also a RICO defendant, no, your Honor.

THE COURT: And it's true that your allegation is that the sole purpose of these corporate entities is to commit the fraud, commit the fraud you charge.

MS. BURGOS: Yes, your Honor.

Your Honor, to the extent that they also

argue that the RICO allegations or the RICO claims fail because the RICO enterprise isn't different from the person I respectfully submit that that's wrong, too.

Number one, when the enterprises alleged are corporations that distinction requirement is satisfied simply by naming as RICO persons the corporate owners or employees or other people that acted and participated in the racketeering activities in furtherance of the scheme to defraud and that's what we have here. We've got GNK Medical Supply as one enterprise, we've got High Lawn Medical Supply as a separate enterprise, and we've got their individual owners as the RICO persons. So that distinction requirement is satisfied as pled in the complaint.

To the extent another basis that they challenge the RICO claims is based on the plaintiff's failure to properly plead mail fraud that is unsupported by the pleadings in this case.

Number one, with respect to GNK, the plaintiffs have alleged that over the course of three years, and with respect to High Lawn two years, that defendant Aminov engaged in a pattern of racketeering activity which was -- which purpose was to defraud the plaintiffs into paying fraudulent bills; that he participated in the racketeering activity by submitting those fraudulent bills; that those acts were remit the since they were intended to

further the same criminal enterprise, and we've also satisfied the continuity requirement because those acts occurred over a substantial period of time and won't -- and there's open-ended continuity because they won't be stopped and pose a certain threat to continue into the future if not halted by civil or criminal prosecution.

THE COURT: Does open-ended continuity, does demonstrating that require you to show that as we sit here today that there's a threat to continuity into the future?

MS. BURGOS: Well, at the time of the pleadings, yes, your Honor. And even if that were the requirement, that is the case here because on the underlying issues, or on the underlying bills, the defendants continue to seek reimbursement under the No-fault Law.

THE COURT: What if they didn't? What if they were up and running one of these corporations that was formed you allege solely to commit no-fault fraud. And they're up and running for two months and then they're shut, down and they're indisputably gone, it's dissolved. There's no closed-ended continuity for that period of time. Are you out of luck on your RICO claim because there's no threat of -- there's no threat of continuity?

MR. STERN: Your Honor, if I may?

With respect to open continuity, the Supreme Court has held, and this Circuit has held, that two months

and a matter of weeks can actually be sufficient if there is a continuing ongoing threat of criminal activity but for the RICO action that would have continued or whether --

THE COURT: I'm not saying about the RICO action. Just suppose they went belly up some reason other than you stepping in. So there's no current threat of continuity going forward at the time the complaint is filed can you still satisfy the pattern requirement?

MR. STERN: If it was open-ended continuity and we're looking at a very short duration, and there was -- and the reason for the termination of the enterprise was because of reasons other than law enforcement or civil action and I'm not sure that any court has addressed that specific issue, your Honor.

THE COURT: What if they had to? What would you tell them to do?

MR. STERN: I would tell them, I mean, it is in our fact pattern here. We have a closed end, we satisfied that in substantial duration. If I were to advise the Court, your Honor, if I may, I would say that if you had sufficient racketeering activities going over the course of a couple of months, and the lawsuit followed, that it would be sufficient to bring a lawsuit.

THE COURT: All right. Sorry to interrupt you. Go ahead.

MS. BURGOS: Your Honor, with respect to the mail fraud pleadings, the complaint is replete through the body of the actual pleadings with examples of the fraudulent misrepresentations made by the defendants.

In addition to that, we have no less than 42 exhibits in the appendix to the complaint in which each of the exhibits specify what the misrepresentation was, provides the claimant's initials, the claim numbers, the specific billing codes that the defendants used that plaintiffs take issue with, the name of the entity, and the specific wrong.

In addition to the 42 exhibits, we've got an appendix of predicate acts that includes, among other things, the claimant's initials, the claim numbers, the documents that the defendants submitted, the date of service for the DME items that were included on the bills submitted, the fraudulent misrepresentations included on those bills.

And so, with the specific examples in the body of the complaint, the exhibits attached to the complaint, the detail included in the predicate acts, it is just not understandable that any argument can be made that the plaintiffs have failed in their allegations to sufficiently plead mail fraud.

To the extent that the defendants also argue that the mail fraud aspect of plaintiff's complaint fails

because the plaintiffs fail to include copies of the actual bills, well, the courts have clearly indicated in this district and others that that's not required. That to the extent that in RICO there is a particular particularity requirement that it is enough where a plaintiff delineates with adequate particularity in the body of the complaint the specific circumstances constituting the overall fraudulent scheme.

Plaintiffs have included what the fraudulent misrepresentations were in the body of the complaint. They've particularized the fraudulent statements made in detail in the exhibits and in the predicate acts table. To the extent that the defendants also claimed that the complaint, or the predicate acts table, is deficient because there is in distinction between bills I respectfully submit that that's incorrect. The bills are separated or the claims are separated, and clearly identified by claimant's initial and claim number.

So that the defendants are clearly aware and on notice of what the allegations are as against them, and so the particularity requirement as to the mail fraud is sufficiently pled. There is one argument that the defendants represented by Mr. Blodnick and Ms. Diglio include in their papers with respect to the RICO claims being time barred, and I respectfully submit that based on

allegations in this complaint there is just no merit for that.

Number one, the causes of action with respect to GNK indicate that the participation in the affairs of the enterprise began in 2008. With respect to High Lawn began in 2009. The original complaint was filed in May of 2011. The first amended complaint was filled in August --

THE COURT: I get it. So everything is within the statute.

MS. BURGOS: Correct, your Honor.

Now, I think it should be noted that with respect to the RICO claims, it is only those defendants represented by Ms. Diglio and Mr. Blodnick that have made any challenge whatsoever to those RICO claims.

With respect to the defendants represented by Mr. Tsirelman and Mr. Valerio, their only challenge to plaintiff's claim as it relates to the pleading is with respect to the fraud claim. And there they made two, both defendants, make two similar arguments both of which should be rejected by the Court.

The first being that the complaint is not sufficiently specific because the allegations are -- don't set forth what the fraudulent misrepresentations are with the particularity or the specificity required for a fraud claim;

And, number two, the second argument that they spent much time about today and that is that it is just not reasonable for a sophisticated insurer such as the plaintiffs to rely on their own documents.

Well, for the same reasons that the plaintiffs' complaint satisfactory the particularity requirement, I respectfully submit that the fraud claim as pled against all these defendants is sufficient. It provides them with information as to the basis of the allegations, the basis of the claim. It provides them with specific details and exhibits, the predicate acts, and the actual body of the complaint.

And with respect to the reliance aspect. Your Honor correctly indicated, or recognized, that whether it's reasonable or not for the insurers to rely on their documents is an issue that is not appropriate on a motion to dismiss. It is an issue of fact so that it's not something that's within the realm of the motion that's currently pending before the Court.

THE COURT: What's your response to their argument about facially defective.

MS. BURGOS: Well, with that, your Honor, I think one thing is key. The courts have unanimously indicated that insurers have the right to rely on facially valid claims, and the reason for that -- on facially valid claims.

And the reason for that is this -- in No-fault, there is a strict 30-day requirement for the insurers to act.

THE COURT: I'm not talking about facially valid claims.

MS. BURGOS: From an insurance perspective, they are facially valid. I mean, they're the ones that are representing on the face of the document that this is the code that pertains to this particular item. This is the price that pertains to this particular item, and when you're dealing with an insurer that is processing hundreds, if not hundreds, of thousands of claims they have to be able to rely on what's on the face of that claim. And so, what the plaintiffs have pled is that they did rely on the face of those claims. We've satisfied at a minimum the elemental pleading requirement that the plaintiffs justifiably relied on the documents that they submitted in support of their claims for reimbursement.

THE COURT: What if the deficiency is patent on the face of the claim nonetheless rely on it? Shouldn't that be unreasonable reliance.

MS. BURGOS: Your Honor, that gets back to what your Honor recognized earlier. Whether it's reasonable or unreasonable.

THE COURT: What if it's phantom code? What if it's a code that doesn't exist? And so, I just got to look

at it and you can see if there is a problem with it. Would reliance on that be unreasonable.

MS. BURGOS: Your Honor, again, to the extent we're talking about reasonableness it's not an issue for a motion to dismiss. Now, what it gets back to this is this --

THE COURT: It might be, as a matter of law, would not be reasonable reliance. It could be a motion to dismiss issue, that's what I'm asking you.

MS. BURGOS: And I don't think, your Honor, that on its face with 30 days to process hundreds of thousands of claims that an insurer can make that determination. They got to take their bills at their face, accept that they have represented that this is what it says it is, and process that claim.

THE COURT: So they're excused from the due diligence requirement because they didn't hire enough people to review the claims in the 30 days.

MS. BURGOS: It's not a matter of due diligence, your Honor. It's a matter of satisfying what their obligations are under the law to promptly reimburse these claims. That's the overarching purpose of the No-fault Law and that is to promptly reimburse these claims. So that is what they're doing -- they rely on the bills, they make their determination they pay, and, consistent with what

Mr. Natbony indicated, the law is set forth such that if after the fact they come across evidence or information that supports that the original bills that they dutifully processed were fraudulent in any way, shape, or form they are entitled, they have the right to initiate action to get that money back.

THE COURT: This case consists solely of that type of a claw-back type of recovery being sought. Are there any claims that were not paid that are the subject of this lawsuit?

Do you understand the distinction.

MS. BURGOS: Yes, your Honor. These are all claims that had been paid.

THE COURT: Okay.

So there is no sense in which the defendants here are in the posture that you say is contemplated by the arbitration provision -- a person making a claim for first-party benefits. We don't have any of those in this case?

MS. BURGOS: No, your Honor.

MR. STERN: Your Honor, if I may, just one thing:

While Ms. Burgos was addressing the Court, I revisited your hypothetical if you may.

THE COURT: You want to revise your answer?

MR. STERN: I have revised my answer, and I think

under prevailing case law, not our facts here, but under prevailing case law I think that it probably would not be sufficient to stay the cause of action under the open-ended continuity test.

THE COURT: Okay.

MR. NATBONY: Your Honor, may I just ask on the *CompuCredit* issue would you prefer that I submit something in writing, or will the record of the argument be sufficient?

THE COURT: If I want something I'll ask for it.

MR. NATBONY: Thank you, your Honor.

THE COURT: Anything else from the plaintiff's side.

MS. BURGOS: Your Honor, I will rely on our brief to address the issues raised by defense counsel with respect to the unjust enrichment claim except to say that the argument that they've raised has been squarely, repeatedly, and unequivocally rejected by courts time and again in this district. So I will rely on the arguments with respect to the unjust enrichment claim.

THE COURT: Thank you.

MS. BURGOS: Thank you, your Honor.

MR. VALERIO: I have to be brief otherwise I'm going to get a parking ticket so starting with the last point addressed by your Honor.

There are thousands of fee schedule disputes litigated in court where an insurer reviews a bill or receives a bill, reviews it, and says: You billed too much, let me reduce the payment.

Now, to claim that they didn't have time, or they are so overworked that they can't do it is disingenuous and let's just leave it at that.

In terms of *Mallela* now, this is important as a distinction. *Mallela* involved the situation in which the professional corporations could never have billed for their services. They were not entitled, as a matter of law, to get paid. The Court of Appeals said: Under the circumstances, you insurers can go and get your money back because they couldn't have gotten it to begin with.

The situation before the Court is completely different, and it's governed by *Fair Price* where the Court of Appeals said, well, there was an accident. The policy obligations were triggered. What Travelers in that case was arguing there was billing fraud, and the Court said you didn't do it in a timely fashion.

Why am I saying this? They keep on saying that *Mallela* allows this type of action the one before you, it doesn't. It doesn't. *Fair Price* instead precludes it. §409, Section 409, they try to distinguish it by saying insurers cannot start arbitrations.

So what is the import of that comment? The No-fault Law gave one party, and one party only, the right to elect arbitration. §409 did not overrule that provision. There is an imbalance, if you will, in No-fault and this is the price at that claimants had to pay in order to have their claims paid expeditiously.

THE COURT: Sorry to interrupt, and I take no responsibility if you get a ticket, but the -- is the arbitration issue in this case the same as it was in *Lyons*.

MR. VALERIO: No. It's before the Court, we have the arbitration clause in the contract.

THE COURT: Okay.

MR. VALERIO: We're not relying on §5106, we're showing you the contracts.

THE COURT: Right. I thought it was different.

MR. VALERIO: And again, consider what they're saying. Because we already paid, this is no longer under the purview of that provision, that's absurd. Why? Because countenance in this proposition would allow insurers to just pay everything, and instead of 30 days have six years to go and challenge a claim that's absurd. First.

Second, by its own language, this falls within the clause. The defendants here are entities that received payment for first-party benefits.

Now, there is a dispute. The insurer says:

You're not entitled to those because the bills are fraudulent, and whatever other litany of complaints they have. That's the central dispute about those claims. Without those claims, there would be no dispute.

Finally --

THE COURT: Who's got the right to arbitration? The person making the claim for first-party benefits?

MR. BLODNICK: Or their assignee. Or their assignee?

THE COURT: Could you not interrupt.

MR. BLODNICK: I'm sorry, your Honor.

MR. VALERIO: And only that person. And again, this is the price.

THE COURT: Do I have any such person before me?

MR. VALERIO: Well, yes, your Honor.

THE COURT: Because I don't understand you to be making a claim for first-party benefits. You made it, you got paid.

MR. VALERIO: Right. We're still -- any issue arising under that claim must be arbitrated.

MR. TSIRELMAN: Your Honor, if I may add to that, please.

The assignments the in Insurance Law are not simple assignments. When we get an assignment --

THE COURT: I don't mean to suggest that it's the

assignment that might be the problem. I mean to suggest the fact that the claim got paid.

MR. TSIRELMAN: I am getting to that.

THE COURT: Okay.

MR. TSIRELMAN: I'll make it short. When the claim --

THE COURT: You don't have to.

MR. TSIRELMAN: Okay.

THE COURT: It's not my car out there.

MR. TSIRELMAN: When we receive an assignment or where a medical provider or a supply company receives an assignment and submits its bill, when that bill is paid the assignment is not extinguished.

For example, if the supply -- if the same supply company receives another prescription for a supply, and has to send another bill to the insurance company, it does not need another assignment. Once it receives the first assignment, they become the assignees to eternity. So with each and every bill, they do not need to get a new assignment. The first assignment is enough to submit each and every bill for the next 20 years. And as long as there's a controversy, as long as there is a dispute between the parties, the assignment is valid; they're still the assignees.

THE COURT: All right.

MR. BLODNICK: Can I be heard, your Honor?

THE COURT: Not yet.

Are you finished.

MR. TSIRELMAN: Yes, your Honor.

THE COURT: And you, sir.

MR. VALERIO: The FAA, your Honor, by its own terms applies to dispute. The clause is clear, it's broad. It applies to any dispute regarding any matter relating to the claim. Not only when we asserted in a first-party action, but also like here when the validity of those claims is questioned.

Thank you, your Honor.

THE COURT: Thank you. Yes, sir.

MR. BLODNICK: Your Honor, it really boils down to these five lines here:

"In the event any party making a claim for first-party benefits and the company do not agree regarding any matter relating to the claim."

Now, your Honor is questioning whether any matter related to the claim is including a matter to try to get the money back for a claim paid I believe it is. That's the first part, that's the first issue your Honor has to determine. Is it a claim to get the money back relating to the claim, I believe that it is.

The second argument made is that the

insurance company -- that the Superintendent of Insurance determines whether it is an arbitration or not. That's not what the language says which my learned adversary argued. It's really a ministerial act. We, as the assignee, have the right to the arbitration.

So what would happen is with§409 they have a trite start the action and then we have a right to a stay and to commence an arbitration to resolve the dispute. We have the right to select the forum in which the claim is determined, they don't, I agree with them. Under §409 they don't have the option but we do have the option.

Thank you.

THE COURT: Thank you. I'm going to reserve.

MR. VALERIO: May I make one clarification?

THE COURT: No.

MR. VALERIO: Thank you, your Honor.

THE COURT: On motion to compel arbitration, I will reserve on that I'll decide that in writing. The rest of these motions are denied. I'm not going to belabor the record with it. I have related cases in which the same counsel have appeared.

I will file an opinion very soon, today or tomorrow, in the *Lyons* case where there'll be a more adequate description of my reasoning with respect to the other aspects of the motions before me but very briefly.

On the RICO claims, the general complaint about the use of the RICO statute in this context that suggested earlier has been -- doesn't seek any particular relief. But, in any event, it's really a matter for Congress to address, not me.

The challenges based on the claimed failure to allege an adequate enterprise because it doesn't plead an ascertainable structure distinct from that inherent in the alleged pattern completely misses the mark. The enterprise that's alleged here is not an association-in-fact enterprise, but a corporate entity, a legal entity, within the meaning of §1961(4) even though it's alleged to do nothing but illegal business. It's also not one of the RICO defendants which further defeats the claim distinctness problem an enterprise's sole purpose can be fraud contrary to the defendant's argument, see *U.S. versus Turkette*.

The pattern challenged to the alleged pattern has no merit. These schemes as alleged, and this is a motion to dismiss, and I have to take the well-pleaded allegations to be true. They are the epitome of closed-ended continuity, excuse me, of open-ended continuity. The sole purpose of these entities is to commit fraud. The threat of continuity in here is in the racketeering activity alleged.

The challenges to the specificity of the

fraud alleged, and the sufficiency of the pleadings in this regard, which afflict both the -- not afflict -- they are a part of the challenges both to the RICO count and to the state law fraud counts have no merit. It's a 162-page complaint with a bunch of appendices and exhibits that lay out the claim number and the date submitted, billing codes used, and the like.

There is ample, maybe too much specificity of the allegations in this complaint so those challenges have no merit.

The statute of limitations argument is frivolous. All the alleged acts being within the limitations period.

The argument that with respect to the fraud claim that Allstate is a sophisticated insurer so it can't properly plead reasonable reliance as I suggested during the argument itself I think is not something that can properly be decided at this stage of the game. It's such a -- the reasonableness of the insurers' reliance is intensely fact bound; it can't be decided as a matter of law.

The challenge to the unjust enrichment claim fails. Plaintiffs can plead unjust enrichment as an alternative to the contract remedies.

The joinder and severance arguments are denied. The defendants and the causes of action were

properly joined under §20(a)(2) of the Federal Rules of Civil Procedure which allow joinder, "In one action where any right to relief is asserted against the defendants jointly, severally, or in the alternative with respect to or arising out of the same transaction occurrence or series of transactions or occurrences, and any question of law or fact is common to all defendants and will arise in the action."

Under *United Mine Workers against Gibbs*, 383, U.S. 715 at 724, it's a 1966 case from the Supreme Court I'm instructed that the impulses toward, "Entertaining the broadest possible scope of action consistent with fairness to the parties. Joinder of claims, parties, and remedies are strongly encouraged."

Here, all the moving defendants submit an identical delivery receipts and/or assignment of benefit forms to the plaintiff and contain the same irregularities, obviously, based on a shared template and we use the same phantom billing codes for the same items strongly suggests coordination among the defendants. And because the complex schemes that are alleged are generally identical they're clearly logically related.

Severance may be an issue that is going to be properly addressed once again down the road assuming the case survives what remains of the motions. I can see the possible prejudice. I can see possible prejudice to

configurations of plaintiffs if they're all to be tried together, but at the moment I see nothing but efficiency in keeping them together in the case. So any application at this point to sever -- or the application to sever is denied.

I will reserve on the motion to compel. The aspect of the motion to compel that this case shares with the *Lyons* case will be addressed in that Memorandum and Order, and to the extent there is a separate argument here I will deal with it separately.

MR. VALERIO: Thank you.

MR. STERN: Thank you.

MS. DIGLIO: Thank you.

MS. BURGOS: Thank you.

MR. NATBONY: Thank you.

MR. BLODNICK: Thank you.

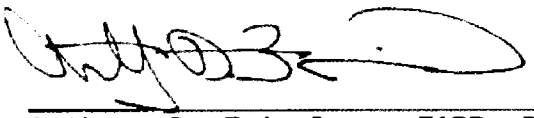
THE COURT: Thank you.

(WHEREUPON, this matter was adjourned.)

* * *

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of the record of proceedings in the above-entitled matter.



Anthony D. Frisolone, FAPR, RDR, CRR, CRI
Official Court Reporter

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